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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROLANDO CRUZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED

Whether a non-testifying co-defendant's statement, introduced at a joint trial, falls under the *Bruton* exception to the general principles governing curative jury instructions when the statement has been redacted by the use of neutral terms so that it is not facially incriminating.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 121 Ill. 2d 321, 521 N.E.2d 18 (1988) (See Appendix A). The order of the Illinois Supreme Court denying rehearing is not reported but is attached hereto (See Appendix B).

JURISDICTION

The opinion of the Illinois Supreme Court was filed on January 19, 1988. A timely petition for rehearing was filed

by petitioner. On April 5, 1988, an order denying the petition for leave to appeal was entered.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3). The instant petition for writ of certiorari is filed within 60 days of the Illinois Supreme Court's order denying rehearing. United States Supreme Court Rule 20; 28 U.S.C. section 1257(3). The decision of the Illinois Supreme Court was premised upon federal constitutional grounds and does not rest upon any independent state ground.

STATEMENT OF THE CASE

On the afternoon of February 25, 1983, ten year old Jeanine Nicarico was abducted from her parents' Naperville home. Within hours Jeanine was raped, subjected to deviate sexual assault and beaten to death with a blunt instrument. Jeanine's body was discovered two days later in an isolated area of Naperville known as the Prarie Path, close to the East-West Tollway. On March 9, 1984, Rolando Cruz ("respondent") Alejandro Hernandez and Stephen Buckley were charged by indictment with murder, rape, deviate sexual assault, aggravated indecent liberties, residential burglary, home invasion and aggravated kidnapping based on the criminal conduct against Jeanine. (R.C. 1-12) During pre-trial proceedings the defendants moved for separate trials. The trial court denied these motions, but ordered the prosecution to redact all references to non-declaring co-defendants contained in the statements of declarant co-defendants.

Following numerous other pre-trial motions, the cause proceeded to a joint jury trial.

The prosecution's theory as to the defendant-respondent Cruz was that the substance and circumstances of a series of admissions which he had made to friends and to police containing detailed knowledge of certain unpublished circumstances surrounding the abduction, assault and murder of Jeanine Nicarico, together with the fact that he was familiar with the place where Jeanine's body was found, and was a friend of the young man who had been seen in the vicinity of the Nicarico home on the afternoon of the abduction and whose bootprint had been found on the kicked-in door of the Nicarico home—compelled the conclusion that Cruz was part of the joint venture which spawned the crimes with which he was charged. The prosecution also contended that the defendant-respondent's alibi for the time of the crime was thoroughly impeached and incredible.

The defense theory of the case was that respondent made a series of false statements to the police in an effort to convince them that he was aiding the investigation. In addition, respondent took the position that he did not make inculpatory statements to his friends. Respondent also claimed that he would present a credible alibi.

At trial, Patricia Nicarico, Jeanine's mother, testified that on the day of the murder Jeanine was sick and stayed home from school. (R. 3474-75) That morning, Mrs. Nicarico went to work at a nearby school and the other members of the family also left; Jeanine's father went to work and her two sisters went to school. At noon, Mrs. Nicarico went home and made lunch for Jeanine. (R. 3478, 3526) Lunch consisted of a grilled cheese sandwich, Orange Crush soda and chocolate chip ice cream with mint sauce. (R. 3479) Mrs. Nicarico told Jeanine to keep the door locked and not to open it for anybody. (R. 3482) Mrs. Nicarico returned to work at 12:30 p.m. (R. 3481) The door was locked at that time. (R. 3482) Jeanine was wearing a

nightshirt which showed a picture of a dwarf and said "I am sleepy." (R. 3482) She also wore a pair of polka dot panties. (R. 3482)

At approximately 1:00 p.m. Jeanine called Mrs. Nicarico at work and they talked about a television show which Jeanine had watched. This show had mentioned the town where Jeanine's grandparents lived and Mrs. Nicarico suggested that Jeanine write them a letter. (R. 3484) This was the last time that Mrs. Nicarico spoke with Jeanine.

Kathy Nicarico, Jeanine's fifteen (15) year old sister, testified that when she left for school on the morning of February 25 her bed was "sloppily made." (R. 3434) Covering the bed was a fitted sheet, a flat sheet, an electric blanket, a bedspread and a security blanket. (R. 3433)

Later that day Kathy returned home from school. (R. 3462) She noticed that the storm door on the front entrance was closed and the wooden door, located inside it, was open. (R. 3309) The molding around the door was "hanging out" from the door frame. (R. 3436) (Evidence technicians later processed and photographed long streak marks made by a small hand along the inside wall leading to the doorframe beneath the separated molding. The streak marks were about three feet above the floor.)

Kathy went inside the house and called for Jeanine. (R. 3437) She noticed that the television set located in the family room was on. (R. 3438) When there was no answer, she became scared and went to the home of Diane Dirksen, a neighbor, where she explained that Jeanine was missing and that someone might have broken into the house. (R. 3437) Kathy testified that these events occurred between 3:00 and 3:05 p.m. (R. 3450)

Kathy and Mrs. Dirksen returned to the Nicarico home and searched for Jeanine, but failed to locate her. (R. 3440, 3458) Kathy noticed that the condition of her bed-

room was different than it had been when she left for school that morning. (R. 3443) Specifically, the items located on top of her bed were moved and a sheet and security blanket were missing. (R. 3445-48, 3450) The security blanket was a faded pink color and had round circles embroidered on it. (R. 3449)

Ms. Dirksen telephoned Jeanine's mother and explained that Jeanine was missing. She then continued to search for Jeanine. (R. 3459-60) She recalled that when Mrs. Nicarico arrived at home, she first looked for Jeanine and then called the police. (R. 3461)

Naperville Police Officer John Bootz testified that at 3:25 p.m. on the day of the kidnapping he responded to a call and went to the Nicarico home. (R. 3547-48) He examined the front door and noticed a large bootprint located slightly to the left and under the door handle. (R. 3549) (Expert testimony offered by the prosecution at trial concluded that the bootprint was made by the boot of Stephen Buckley, one of the respondent's friends.) The authorities began an extensive search in the hope of finding Jeanine alive. This effort proved to be unsuccessful.

Mrs. Nicarico recalled that, at 3:15 p.m., after receiving a call from Diane Dirksen, she left work and went home. (R. 3489) After looking around the house she called the police. (R. 3490)

Two days later, on the evening of February 27, the police informed the Nicaricos that they had located Jeanine's body. (R. 3514-15) On the next day Mr. and Mrs. Nicarico went to the DuPage County Morgue and identified Jeanine. (R. 3515-16)

Mrs. Nicarico testified that she had hired a cleaning woman named Janie Ruiz. (R. 3518, 3533) Mrs. Ruiz had cleaned the house twice before Jeanine's murder. (R. 3519-20)

Mrs. Nicarico also testified that on the day of the crime a sailboat was parked in the driveway. (R. 3544)

Chris Nicarico, Jeanine's sister, testified that she provided the police with a list of persons who were in the house on Friday so that their fingerprints could be eliminated. (R. 3820)

Tom Nicarico, Jeanine's father, testified that many different people were in the house during the year preceding Jeanine's murder. (R. 3854) He also described a black gas lantern which was located in the front yard of the Nicarico home. (R. 3832)

On the afternoon of February 27, 1983, Charles Bryant, Kerry Morrick and Morrick's young son were walking through some woods near Eola Road and I-5 when they discovered Jeanine's body. (R. 3846, 3848) They left the area, returned with a friend and then asked someone at a nearby house to contact the police. The police arrived and decided to wait until morning before moving Jeanine's body in order to process the crime scene. (R. 3909)

Jeanine's body was face down on a slight grade which was covered with a dense brush. A "head shaped" depression was located approximately two (2) feet from Jeanine's head. (R. 4071, 4072-73) (People's Exhibits 10-45, 10-59, 10-60) Mud and leaves had adhered to the back of Jeanine's head. (R. 4057, 4062-63) (People's Exhibit 10-47, 10-52)

Dr. Frank Cleveland, the Hamilton County, Ohio, coroner, performed an autopsy on Jeanine's body. (R. 4290) Dr. Cleveland testified that he had performed over 10,000 autopsies and supervised between 10,000 and 15,000 additional autopsies. (R. 4285)

Dr. Cleveland noted that Jeanine was 4'3" tall and weighed 65 pounds. (R. 4293) Toweling covered the front and left side of her face, including her eyes and nose. The

toweling was bound around Jeanine's head with adhesive tape and was "firmly attached." (R. 4293, 4308) Jeanine wore only a nightshirt, which was slit the entire length of the right side. (R. 4314)

Dr. Cleveland testified that Jeanine died from massive trauma to the head caused by a blow or blows struck with a blunt instrument. (R. 4323-24) Jeanine sustained two blows to the front of her head. (R. 4293) One blow, struck to the left side of her head, caused a huge laceration. As a result of the blow, "[t]he entire skull was split and separated up to a quarter of an inch. . . ." (R. 4298) This split ran from just above Jeanine's nose to the base of her skull. (R. 4298) Jeanine had other facial injuries, including a broken nose, a complete laceration of her upper lip and severe bruising of her lower lip. (R. 4309) She also sustained hemorrhaging to the eyelids. (R. 4322)

Jeanine also sustained at least three blows to the back of the head. (R. 4326) These blows were struck with a "phenomenal amount of force" (R. 4326), and each one was sufficient to cause death. (R. 4303) It was impossible for Dr. Cleveland to determine the order in which the blows were struck. (R. 4313-14)

Dr. Cleveland testified that the "magnitude of the force used [against Jeanine] was huge." (R. 4300) He also characterized it as "an enormous force." (R. 4300) He noted that the outer table of Jeanine's skull had separated from the inner table, the first time he had seen such an injury. (R. 4299-4300) One of the blows to the back of Jeanine's skull fractured the coronal suture, an injury which Dr. Cleveland had previously observed only in airplane crash cases. (R. 4306)

Dr. Cleveland testified that Jeanine's thighs were bruised and that blood was coming from her vagina. He noted that the "entire vaginal tract was hemorrhagic." (R. 4309-

10) Based on this evidence it was Dr. Cleveland's opinion that Jeanine was raped. (R. 4310)

It was further established that Jeanine had sperm and seminal fluid in her rectum. (R. 4552)

Dr. Cleveland noted that the lividity in Jeanine's body indicated that it was at the spot where it was finally discovered for some period of time (R. 4337), although the precise period of time was impossible to determine. (R. 4333)

Haydee Hernandez, mother of respondent's co-defendant Alejandro Hernandez, testified that at the time of the murder she lived with Hernandez in a house located on North Ohio Street in Aurora. (R. 4618, 4620-21) Mrs. Hernandez recalled that during late March she spoke with Hernandez about a murder. (R. 4623-25) At the time Mrs. Hernandez thought Hernandez might be talking about the Nicarico murder. Mrs. Hernandez was unaware that a reward had been offered for information in the case. (R. 4642) Hernandez said that he passed a Jewel supermarket when some friends asked him to join them for a beer. (R. 4625) Hernandez stated that, during a conversation which followed, a man who Hernandez did not know said, "[h]e don't [sic] want to kill her but he killed her because she started screaming." (R. 4626) Hernandez stated that the man was a friend of those persons who invited him to have a beer and further stated that he would be able to identify him. (R. 4629, 30, 32)

Mrs. Hernandez testified that she and Hernandez agreed that they had to do something about what Hernandez heard. (R. 4627) On the following day respondent agreed to talk with his uncle, Wilfredo Estremera. (R. 4628)

Wilfredo Estremera testified that during the first two weeks of March, 1983, Hernandez said, "Uncle, you know what? I know the guy that killed the little girl in Naper-

ville." (R. 4648) Hernandez went on to identify this man as a person named Ricky. (R. 4648) According to Hernandez, Ricky drove a green and gold car. (R. 4649) Hernandez described Ricky as "a white boy [who] hangs out in Aurora, and [who] is from Oswego." (R. 4650) Ricky told respondent "that he had killed her, that he didn't want to do so but she had it coming anyway." (R. 4649) Ricky did not state why the victim "had it coming," but said that the victim had started crying. (R. 4651) Ricky said that he was sorry he had killed the little girl. (R. 4652)

Hernandez told Estremera that he had not called the police because he was afraid of being killed. (R. 4653) Hernandez declined Estremera's offer to take him to the police. (R. 4654)

Detective John Sam testified that he and Detective Kurzawa spoke with respondent on March 14. (R. 4854) The detectives told Hernandez that they received an anonymous call indicating Hernandez knew about Jeanine's murder. (R. 4857) Hernandez first denied knowing anything about the murder, but later said that he was in an automobile with Steve Buckley, Mike Castro and a man named "Ricky Benevides." Respondent said that "Ricky" was from Oswego. (R. 4858) "Ricky" said that "he killed the little girl in Naperville." (R. 4858)

Hernandez told the detectives that Ricky said he was going to "rip-off" a house for money. Hernandez said that "Ricky" went from town to town committing burglaries. (R. 4907) "Ricky" associated with a man named Frankie Delgado. (R. 4907)

Armindo Marquez testified that he had known Hernandez since they were in kindergarten. (R. 5297) In March of 1983 Marquez was in the Kane County Jail when the police spoke with him as part of the investigation in this case. (R. 5301) Marquez was taken to a building next to

the jail and placed in a room with Hernandez. (R. 5303) Marquez was not told that he might receive a reward for doing anything in regard to this case and he never asked the police about a reward. (R. 5386) Marquez spoke with Hernandez and asked him if he was involved in murdering Jeanine. (R. 5305) Hernandez stated that he knew who committed the crime. He identified a police photograph as a person named "Ricky," but said that he was going to falsely give the police that name. He said that he did not want to tell the police the true identities of the persons involved. (R. 5305) Hernandez later said that Marquez knew the "real guys," but refused to disclose their names, "because he said if he were to give their names, he would get shot." (R. 5306)

Hernandez told Marquez that, on the day in question, he "dropped his partner off, went around the block once and pulled up in the driveway." (R. 5306-07) Hernandez went on to say that, "his partner dragged the girl out of the house by her ankles." (R. 5306) He recalled that a night light located in the front of the house bothered him. (R. 5308) They took the girl to an abandoned place where they killed her because "she was making too much noise." (R. 5307) Hernandez recalled that "[s]he kept on screaming, wanting to go home." (R. 5307)

Hernandez admitted that "he used something to tie her eyes with and then he held her and the other guy hit her." (R. 5307) The weapon used was a bat. (R. 5313) The men then dumped the body and "stomped on the back of her head." (R. 5307-08)

Assistant Kane County State's Attorney Thomas Sullivan testified that Marquez's sentence for burglary in Kane County was not influenced by his cooperation in the present case. (R. 6428) Sullivan did not communicate with authorities in DuPage County prior to Marquez's plea. (R.

6430) He further testified that Marquez did not request any consideration in exchange for his cooperation. (R. 6429)

On August 18, 1983, Jackie Estremera, Hernandez's sixteen (16) year old cousin, was called to testify before the Grand Jury investigating Jeanine's murder. He denied any knowledge concerning the crime. Estremera testified again on October 6, and again indicated that he knew nothing about the crime. Two days later Estremera told Hernandez that he had been called to testify and asked Hernandez "what was going on?" Hernandez replied that he knew who killed Jeanine and that "he wasn't going to say nothing [sic] unless he got money." (R. 4712)

Hernandez went on to tell Estremera that he and others had planned for a long time to rob the house in Naperville (identified as the Nicarico residence) because the houses there contained "better things to steal." (R. 4720-21) On the day in question, Hernandez and the other persons "were all messed up on paint," (R. 4714, 4717) meaning that they had used the drug toluol in the form of glue. (R. 4723) They left and went to the Nicarico house and, while respondent stayed in the car, the others went up to the front door. (R. 4717-18) These persons then kicked the door in. (R. 4718) Hernandez stated that the person who did it was in California. (R. 4718) They took a "little girl" who was inside the house because they were afraid that she would recognize them if the police showed her their photographs. (R. 4720, 4722-23) The men had not expected to find the girl inside. (R. 4722) Hernandez was crying during this conversation. Estremera had never seen respondent cry before. (R. 4746)

Estremera subsequently was arrested for failing to appear before the Grand Jury. The prosecutor told Estremera that if he did not cooperate he would stay in jail

for the weekend. (R. 4740) Estremera later agreed to talk with Hernandez after being fitted with a microphone by the police. (R. 4724) The prosecutor gave Estremera a list of questions to ask Hernandez. (R. 4736) On October 28, Estremera again had a conversation with Hernandez. Estremera told Hernandez about the microphone because he did not want respondent to get in trouble. (R. 4725) Estremera testified that he did not feel that he should get a reward for the information provided in this case.

Arthur Lee Burrell testified that he was serving a prison term in the Illinois Department of Corrections for residential burglary. (R. 6194-95, 6229) He met respondent in 1979 and that the two men became "like best friends." (R. 6303, 6304, 6220) Burrell dated respondent's sister "a couple of times." (R. 6237) Burrell had seen respondent on the Prarie Path "about three or four times a month." (R. 6204) Burrell considered the Prarie Path area between Eola Road and I-5 to be the "most popular" place to have parties between 1979 and 1983. (R. 6206-6207)

While incarcerated on an earlier conviction, Burrell received a series of five letters from respondent. (R. 6208) Respondent indicated in one letter that Naperville was a new area and that "there was no police." (R. 6212) Specifically, respondent indicated that the area was close to Naperville North High School and an A&P grocery store. (R. 6212) After being released from prison Burrell was convicted of residential burglary. He believed that respondent gave the police information leading to that conviction. (R. 6230)

Burrell also testified that he had known Hernandez for a number of years. (R. 6197)

Burrell and Hernandez had built a clubhouse in the Prarie Path area and went there on a regular basis between 1977

and 1981 in order to "party." During 1980 and 1981 Burrell considered Hernandez to be "like a brother." (R. 6213) Burrell last saw Hernandez in 1981. (R. 6215) He recalled that Hernandez carried a nightstick. (R. 6216)

Jimmy Ellis was the supervisor of the Fox Valley Community Correctional Center, a work release center. (R. 6352-6353) He testified that Arthur Burrell checked into the center on February 21, 1983, and was released at 11:40 p.m. on February 25, 1986. (R. 6359)

Ramon Mares testified that he was respondent's distant cousin and good friend. The two men grew up together. Mares held no grudge against respondent. (R. 5259) (R. 5200) In March of 1983 (approximately the 21st or 22nd), Mares and respondent were alone in Mares' car outside a party when respondent asked Mares if he remembered "the killing of the little girl in Naperville." (R. 5203-5204) Mares said that he had in fact heard about the murder and respondent said, "Chuck, don't tell nobody [sic] but I was there and—but I didn't kill her." (R. 5204, 5205) Mares asked, "[h]ey, man, are you serious and is this a joke or are you serious." (R. 5206) Respondent responded, "[n]o, I am serious." (R. 5206) Mares told respondent that he didn't want to talk about the crime or hear about it. He also told respondent, "[y]ou know, don't be joking. It could put you in jail just for goofing off like that." Respondent repeated that he was serious and that he was there, but didn't kill Jeanine. (R. 5204) In describing respondent's condition, Mares stated, "well, he wasn't laughing. He wanted me to pay attention to him, to listen to what he had to tell me." (R. 5206)

Respondent told Mares that Jeanine was taped and beaten. (R. 5209) He said that someone else, "beat the fuck out of her." (R. 5210) Respondent said that Jeanine was not raped or molested. (R. 5211) Mares thought that respondent "had the guts" to commit the crime. (R. 5264-5265)

Mares also testified that John Ruiz and co-defendant Buckley were his friends. (R. 5216-5218)

DuPage County Sheriff's Detective Thomas Vosburgh testified that on the morning of April 19, 1983, he and Detective Kurzawa spoke with Cruz at the Galena Hotel in Aurora. (R. 6421-22) Cruz stated that he knew Alex Hernandez and that he was aware of parties that occurred in the Eola Road area. (R. 6422) Vosburgh did not then, or at any other time, attempt to make Cruz a police informant. (R. 6431)

On May 9, 1983, Detective Vosburgh learned that respondent wanted to speak with him. (R. 6422-23) Vosburgh picked up respondent and drove toward the Sheriff Department offices. While on route, Cruz said that he had a vision earlier in the day. Vosburgh testified that respondent, "kept telling me: It's not true." (R. 6425) Respondent also said that he did not want to believe that it had occurred. (R. 6426) In the vision, respondent saw "the girl that was abducted out of Naperville." (R. 6425) Respondent indicated that the girl was dragged out of the house. (R. 6425)

Respondent further stated that Jeanine was hit so hard in the back of the head, "that it left an impression in the mud of where she laid." (R. 6420) Respondent also said that Jeanine was "violated sexually anally." (R. 6426) Respondent repeatedly asked Vosburgh whether the vision was true. (R. 6426)

Vosburgh drove respondent to the police station, where they met Detective Kurzawa. Respondent then repeated his account of the vision. (R. 6427)

At that point the detectives placed a photograph of the crime scene face-down on the table in front of respondent. They also placed a photograph of Jeanine face-up. (R. 6427) They then asked respondent to look at Jeanine's

photograph and he looked away, saying, "I don't want to look at it." (R. 6427-28) Vosburgh then said that he thought the other photograph would depict respondent's vision and show that it was true. Respondent again refused to look, and then "became emotionally upset and started to cry." (R. 6428) The detectives then left the room. (R. 6428)

Respondent later asked "to stay either at the Sheriff's Office or someplace where [the police] could put him because he was in fear of his life in Aurora." (R. 6429) The detectives arranged to let respondent spend the night in the Sheriff's Office. (R. 6429-30)

Detective Dennis Kurzawa testified that on the evening of May 9, 1983, he had a conversation with respondent. (R. 6482) Respondent stated that he had a vision in which he saw a little girl dragged from a house in a blanket. The girl was in a field and had been struck in the head so hard that it left an impression in the mud. Respondent also stated that the girl was violated anally. (R. 6483) Detective Kurzawa had not informed respondent that the details of the vision corresponded with the details of the present crime. (R. 6483-6484)

On the following day Detective Kurzawa again spoke with Cruz. This conversation was tape recorded and the recording was transcribed. (R. 6508-09) The resulting transcript was marked prosecution exhibit 66.

At the conclusion of Detective Kurzawa's direct examination, the trial court instructed the jury:

> Statements received in evidence shall be considered by you only as they apply to the author of the statement. No other person or persons in this case are to be considered by you in any connection with any such statement.

> I just want to make sure that you do recall that limited instruction and state it for the record at this time.

In the tape recorded statement, respondent stated that he had spoken with Hernandez between 30 minutes and an hour earlier. (R. 6783) Hernandez touched the back of Cruz's head and said, "[r]ight here, right here is where, bust her head, she got hit with that bat[.]" (R. 6783-84) Hernandez said that man named Emilio had done something and then said "I just finished it 'cause [sic] I was getting blamed for it anyhow." (R. 6784) Hernandez went on to describe the house were Emilio lived. (R. 6785)

Respondent also said that he talked with Emilio, who said that he and Ray Oretga "were sniffing upstairs in this house" when Alex brought a girl up and said that Emilio could have sex with her. (R. 6786) Emilio knocked her out "in order to make love to her[.]" (R. 6786) The girl started yelling and fighting him and Emilio "beat her up real bad." (R. 6786) Emilio then hit the girl with a baseball bat, using such force that the bat broke. (R. 6797) Ray got upset and told them to take the girl away. He then kicked the girl down the steps. Alex picked her up, put her in a car and left. (R. 6787) Alex returned later and said that he got rid of the girl. (R. 6787) Ray said that "her nose was busted." (R. 6789) Respondent also told the police that the men were "sniffing paint." (R. 6791)

Stephen Ford testified that he was incarcerated in the Sheridan Correctional Center. (R. 6374) In November of 1983 respondent and Stephen Ford were both in the DuPage County Jail and were assigned to the same tier. (R. 6375) During this time an incident occurred on the tier in which a man named Billy Wanders was sexually assaulted. (R. 6396) Neither respondent nor Ford was involved in the incident. (R. 6375) During a subsequent investigation, respondent told Ford "that next time something like that

happens, I'll just kill 'em and make sure there's no witnesses. . . ." (R. 6378) At the time of this statement Ford had known respondent for about a month and a half. (R. 6372)

A few days later Ford and respondent had another conversation. (R. 6378) Respondent said that he had lived in some woods near a street which divided Aurora from Naperville (R. 6382) and had moved from the area because something had happened and "[h]e had to get out." (R. 6382, 6387) Respondent further stated "[h]e had something out there." (R. 6386) Ford also recalled something about a piece of paper which, to the best of his recollection, involved, "something to the effect of some kind of—killing a girl out in Aurora. . . ." (R. 6383) Ford was unclear about this statement. (R. 6388)

In late May or early June of 1984 respondent asked to speak with Lieutenant Robert Winkler, the second shift watch commander at the DuPage County Jail. (R. 6582-83) Winkler advised respondent of his *Miranda* rights (R. 6594), and respondent explained that two men approached him in February of 1983 and asked if he wanted to be involved in a burglary. (R. 6585) Respondent replied that he didn't want to be involved. The persons then asked to use his car to commit the burglary. Again respondent said no, but agreed to show them how to hot-wire a car. (R. 6585)

Two days later the persons asked respondent if he wanted to have sex with a little girl. (R. 6585) Again respondent declined. (R. 6585-86) Respondent said that the girl was at the house of one of the persons. (R. 6586)

On June 6, 1984, Hernandez asked to speak with Lieutenant Winkler. (R. 6574) Hernandez stated that he wanted to talk about the case and Winkler responded that Hernandez was not required to say anything. (R. 6576) Her-

nandez "sounded like he wanted to get something off his chest." (R. 6590) Winkler advised Hernandez of his *Miranda* rights and offered to let Hernandez make a telephone call. (R. 6576) Winkler also explained that he would have to make a report concerning anything said. (R. 6578) Hernandez said that he trusted Winkler and explained that he and two other persons had planned to commit a burglary at a specific house in Naperville. (R. 6579) The three persons drove to the area in a dark green, late model Lincoln Continental. (R. 6579) They drove around the area for a while when Hernandez lost his nerve and was dropped off some three blocks away. (R. 6579) A short time later the others returned and picked up Hernandez. (R. 6580) When Hernandez entered the car he saw a small girl and several items taken from the home. He described one of the items as a white coffee maker, similar to a "Mr. Coffee" machine. (R. 6580) The girl was frightened and said that she wanted to go home. Hernandez also stated that her lip was bleeding. (R. 6581)

On the next day, June 7, James Roberson, a Deputy Sheriff assigned to the DuPage County Jail, was assigned to transport Hernandez to court. (R. 6560) Hernandez asked Roberson if he had spoken with Bob Winkler and then said, "I'm going to tell you what I got to say." (R. 6563) Roberson explained that he had no questions for Hernandez, who replied that he and some friends had planned to go to the Nicarico home in order to commit a burglary. (R. 6567-68) When they went to the house (R. 6565, 6567), they found a young girl and abducted her. The kidnapping was not prearranged. (R. 6568) Hernandez went on to explain that, "[w]hen this had taken place, they [took] the young girl from the house with them to an unspecified place." (R. 6565) Hernandez did not mention where this was, but said that they attempted to use her in order to get money. (R. 6567) Hernandez said that

when he left the scene the girl was alive. (R. 6565-66) Deputy Roberson asked no questions of Hernandez. (R. 6566)

Respondent presented evidence establishing an alibi.

At the conclusion of trial, the jury found respondent guilty as charged. Co-defendant Hernandez was also found guilty and the jury was unable to reach a verdict concerning co-defendant Buckley. Hernandez's motion to sever his sentencing hearing from respondent's was subsequently allowed. The cause then proceeded to a bench sentencing hearing.

The parties first stipulated to the adequacy of the foundation of People's exhibits 26, 28, 30, 32, 36 and 38. (R. 10110) Steve Pecoraro testified that he met respondent in the DuPage County Jail in November of 1984. (R. 10112) Respondent admitted that he and co-defendant Buckley "used to do a lot of burglaries together." (R. 10114) Also, on one evening Pecoraro heard respondent say, "Let's get out of here. Somebody is home." (R. 10116) Pecoraro called respondent's name, but respondent did not answer. Pecoraro also heard respondent use the word "murder." (R. 10130)

Pecoraro further testified that he and respondent had talked about Jeanine's murder and that he had read some of respondent's transcripts. (R. 10117) On one occasion respondent said, "[o]nce [Jeanine] was taken, we had to kill her." (R. 10118)

Pecoraro also remembered that respondent admitted that he:

> And Alex and Steve Buckley broke into the house. He didn't describe how they got in. He said they broke into the house and found the little girl there, and they then took her away from the house and drove her to an abandoned house in Aurora, I think it was somewhere. (R. 10122)

Respondent claimed that, once at the house, Buckley and Hernandez took Jeanine upstairs. Respondent heard Jeanine screaming and saw her fall down the stairs. Buckley and Hernandez dragged Jeanine back up the stairs and Hernandez said that Jeanine started screaming after "he put two fingers in her vagina." (R. 10122-10123)

During trial, respondent told the witness that he was going to write a book when he got to prison entitled "How to Kill Little Girls," or "Five Ways to Crush a Skull." (R. 10124) Respondent was laughing at the time. (R. 10146) The witness also heard respondent singing "Little Jeanine." (R. 10124-10125)

During cross-examination, Pecoraro testified that trial prosecutor Knight indicated Pecoraro would receive no consideration should he testify. (R. 10163) Knight said that if Pecoraro was expecting any consideration, "he wouldn't even have come to the jail" to talk to Pecoraro. (R. 10163)

Terry Aranjo was also present in the jail when respondent appeared to be sleeping and yelled out, "[t]here is somebody in there," and also yelled out "[s]he's dead." (R. 10243)

Aranjo recalled that when respondent returned from court on February 14, "he was talking about his case and he made the comment that he was going to write a book, 'How to Kill Little Girls,' and he also went on to say he was going to write a book, 'Five Ways to Bash a Skull.' " (R. 10244)

Respondent also told Aranjo that he and Steve Buckley had committed several burglaries in Aurora and Naperville. (R. 10245)

Following the presentation of extensive evidence and argument, the trial court sentenced defendant to death for Jeanine's murder.

REASONS FOR GRANTING THE PETITION

I.

A NON-TESTIFYING CO-DEFENDANT'S STATEMENT WHICH IS INTRODUCED AT A JOINT TRIAL DOES NOT FALL UNDER THE *BRUTON* EXCEPTION TO THE GENERAL PRINCIPLES GOVERNING CURATIVE JURY INSTRUCTIONS WHEN THE STATEMENT HAS BEEN REDACTED BY THE USE OF NEUTRAL TERMS SO THAT IT IS NOT FACIALLY INCRIMINATING.

This case involved the joint trial of three co-defendants charged with murder.

Prior to trial defendants moved to have the cause severed. Defendants based their motions on allegations that pre-trial admissions by Cruz and Hernandez implicated other defendants. Following a series of hearings, the trial court denied the motions finding that a joint trial could be fairly conducted if the statements of declarant co-defendants were redacted to remove references to non-declarant co-defendants.

The cause proceeded to jury trial. Prior to jury selection, the trial court admonished the venire that the evidence against each defendant was to be kept separate. During the selection procedure, the court conducted preliminary questioning of each prospective juror and then allowed the parties to conduct individual questioning. Counsel for each defendant took full advantage of this opportunity. Nine (9) seated jurors were specifically questioned about their ability to keep the evidence against each defendant separate and each indicated they would have no problem doing so. [(Weinstock, R. 2166, 2227-28, 2298) (VanSlyke, 2198, 2199, 2298) (Garonfalis, R. 2394-95) (DeVaun, R. 2360) (Cisek, R. 2826-27, 2834) (Cruise, R. 2708-09) (Bolger, 3081, 3095) (Narro, R. 3002, 3015) (Langsworthy, R. 2900)]

At trial, all identification of Hernandez contained in the statements of co-defendant Cruz were removed and replaced with other terms. (Hernandez's statements were also redacted to remove Hernandez's references to Cruz.) The only exception occurred when Hernandez waived redaction of one statement implicating him along with Emilio Donatlon and Ray Ortega, two men who had nothing to do with the crime. Following crucial admissions by co-defendants Cruz and Hernandez, the trial court instructed the jury to consider the evidence only against the declaring defendant.

During closing argument, counsel for the prosecution and for each defendant admonished the jury to keep the evidence against each defendant separate.

At the conclusion of the trial, the court instructed the jury, in part, that:

> The law that applies to this case is stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others. (S.R. II at 2) (I.P.I. Crim. 1.01)
>
> You should give separate consideration to each defendant. Each is entitled to have his case decided on the evidence and the law which is applicable to him.
>
> Any evidence which was limited to one defendant should not be considered by you as to any other defendant. (S.R. II at 11) (I.P.I. Crim. 3.05)
>
> A statement made by one defendant may not be considered by you against any other defendant. (S.R. II at 12) (I.P.I. Crim. 3.08)
>
> You have before you evidence that a defendant made statements relating to the offenses charged in the indictment. It is for you to determine whether the defendant made the statements and, if so, what weight should be given to the statements. In determining the weight to be given to a statement, you should

> consider all of the circumstances under which it was made. (S.R. II at 13) (I.P.I. Crim. 3.06)

The jury indicated no difficulty in following the instructions and found co-defendants Hernandez and Cruz guilty as charged. The jury was unable to reach a verdict concerning the charges against co-defendant Buckley.

Nonetheless, the Illinois Supreme Court vacated the convictions.

The decision of the Illinois Supreme Court in this case misinterprets this Court's decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1020, 20 L.Ed.2d 476 (1970), and conflicts with this Court's recent decision in *Richardson v. Marsh*, ____ U.S. ____, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In addition, the decision aligns Illinois squarely on the wrong side of what petitioner respectfully suggests is a post-*Richardson* split among the Circuit Courts of Appeals regarding the substitution of neutral terms as a means of redacting statements of non-testifying co-defendants.

The opinion below is consistent with *United States v. Petit*, 84 F.2d 1546 (11th Cir. 1988) which holds that a confession which is not facially incriminating may still violate *Bruton*. *Petit* held that substitution of the word "friend" for defendant's name, when considered with the other evidence in the case, "sufficiently inculpated him so as not to fall under the clear exception to *Bruton* provided by the Court's decision in *Richardson*." *Petit*, 841 F.2d at 1556. This view is inconsistent, however, with the decision in *United States v. Diaz*, 836 F.2d 385 (8th Cir. 1987), where the redaction was accomplished by substitution of the word "someone." In *Diaz* the Court of Appeals' analysis focused only on the face of the statement in finding that the redaction was sufficient.

The petitioner respectfully suggests that the Illinois Supreme Court and the United States Court of Appeals for the Eleventh Circuit have erroneously concluded that *Richardson* created a very narrow exception to *Bruton*. To the contrary, *Richardson* explained that *Bruton* is a very narrow exception to the general rule. In *Bruton*, this Court:

> [H]eld that a defendant is deprived of his Sixth Amendment right to confrontation when the *facially* incriminating confession of a nontestifying co-defendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant.

Richardson, ____ U.S. ____, at ____, 107 S.Ct. 1702, at 1707, 95 L.Ed.2d 176, 186 (1987). (Emphasis supplied). Crucial to the decision in *Bruton* was the fact that, "the co-defendant's confession 'expressly implicat[ed]' the defendant as his accomplice." *Richardson v. Marsh*, ____ U.S. at ____, 107 S.Ct. at 1707, 95 L.Ed.2d at 186. [*See also United States v. Belle*, 595 F.2d 487 (3d Cir. 1979) (*en banc*).]

Although the Illinois Supreme Court recognized that the admissions of co-defendant Hernandez were not directly inculpatory of respondent, the Court went on to find that "the nature of these redactions in the context of the joint trial and the testimony linking [co-defendants] made it impossible for the jury to conclude that the persons to whom Hernandez referred were anyone other than the two men seated next to him in the courtroom." *People v. Cruz*, 121 Ill. 2d 321, 331, 521 N.E.2d 18, 21 (1988).[1] This con-

[1] The petitioners also submit that the Illinois Supreme Court's conclusion that the prosecution misused the evidence of the co-defendant's statements during closing argument is not supported by the record. However, since resolution of that issue is not deemed necessary to a grant of certiorari, petitioners have chosen not to unduly lengthen this petition by addressing it.

clusion, contrary to the reasoning of *Richardson, supra*, ignores both the spirit and the letter of a fundamental premise governing review of criminal cases.

There is an almost invariable assumption of the law that jurors will follow their instructions. In *Richardson*, this Court explained that a very narrow exception to this legal assumption was created in *Bruton, supra*, when a facially incriminating admission of a nontestifying co-defendant was introduced at a joint trial. *Ibid.* In such a case, this Court explained in *Bruton*, no jury could be expected to follow its instruction to limit the application of the statement.

In *Richardson*, this Court explained that the important distinction between that case and *Bruton* was that the redaction in *Richardson* was not incriminating on its face.

> There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. *Id.*, at 124, n. 1, 88 S.Ct., at 1621, n. 1. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." *Id.*, at 135, 88 S.Ct., at 1627. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).
>
> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.

Richardson, ____ U.S. at ____, 107 S.Ct. at 1707, 95 L.Ed.2d at 186.

In addressing the type of contextual linkage analysis undertaken by the Illinois Supreme Court in this case, this Court explained that:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. *Id.*, at 134, n. 10, 88 S.Ct., at 1626, n. 10. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals.

Richardson, ____ U.S. at ____, 107 S.Ct. at 1708, 95 L.Ed.2d at 186, 187.

The fact that the names of co-defendants in this case were replaced with the words "friends" and "two named individuals" makes this case much more similar to *Richardson* than *Bruton*. It is true that there were three co-defendants who were friends. However, there was also evidence that defendants were friends with a large group of persons who were identified and inculpated in various statements heard at trial. Indeed, the prosecution introduced evidence concerning nine "friends" or "acquaintances", some of whom were falsely implicated in the crimes committed against the victim. The presence and mention of those persons further eliminates the possibility that the jury would consider the redacted statements to be facially incriminating against defendant. Because the jury was required to utilize a linkage analysis, the Court's

review should have begun with the presumption that the jury was capable of following its instructions.

The reasonableness of this approach is demonstrated by this case. If the jury in this case had been unable to follow the instructions, it would have convicted co-defendant Buckley as well as respondent. Because the jury did not convict Buckley based on the redacted statements, it is unreasonable to conclude that the jury was unable to follow the instructions given concerning statements made by Cruz and Hernandez.

Disallowing the redactions here chills a prosecutor's use of joint trials. In *Richardson*, this Court explained that:

> Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. . . . Many joint trials . . . involve a dozen or more codefendants. . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes . . . , that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

Richardson, supra, ___ U.S. ___, ___, 107 S.Ct. at 1708, 95 L.Ed.2d at 187.

Under the Illinois Supreme Court's ruling, the prosecutor in this case now faces the dilemma of having to choose either to conduct separate retrials or to totally redact the statements. Presentation of the statements in a manner which removes all reference to participants other than the declarant, however, will only serve to confuse and mislead the jury. This is particularly significant in a case where, as here, a key theory of the prosecution involves a joint

venture by multiple offenders. Courts should not require redaction to be so severe that it misleads the jury as to critical facts in issue.

The price of joint trial should not be the unnecessary suppression of truth. Juries can, and do, follow instructions. This Court should grant the petition for a writ of certiorari and clarify that the exception created by *Bruton* does not extend to cases where the defendant is implicated only through contextual linkage.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the Illinois Supreme Court to review that court's decision which reversed respondent's conviction and death sentence.

Respectfully submitted,

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APPENDIX A

(No. 61678.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ROLANDO CRUZ, Appellant.

Opinion filed January 19, 1988.—Rehearing denied April 5, 1988.

JUSTICE RYAN delivered the opinion of the court:

An indictment returned in the circuit court of Du Page County charged Rolando Cruz (defendant), Alejandro Hernandez, and Steven Buckley with the murder of 10-year-old Jeanine Nicarico (Ill. Rev. Stat. 1981, ch. 38, pars. 9—1(a)(1), (a)(2), (a)(3)), rape (Ill. Rev. Stat. 1981, ch. 38, par. 11—1(a)), deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 11—3(a)), aggravated indecent liberties with a child (Ill. Rev. Stat. 1981, ch. 38, par. 11—4.1(a)), aggravated kidnapping (Ill. Rev. Stat. 1981, ch. 38, pars. 10—2(a)(2), (a)(3)), home invasion (Ill. Rev. Stat. 1981, ch. 38, par. 12—11(a)(2)) (nol-prossed on the People's motion), and residential burglary (Ill. Rev. Stat. 1981, ch. 38, par. 19—3(a)). The circuit court denied defendant's pretrial motions for severance, for separate juries, and for change of venue, as well as his motion to draw the jury panel from another county. After a lengthy trial, the jury returned verdicts of guilty against defendant and codefendant Hernandez on each of the offenses charged, but was unable to arrive at a verdict for codefendant Buckley. Defendant's sentencing hearing

was severed from that of his codefendants, and the cause proceeded to a bench hearing (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(d)(3)). The trial court found that there existed a statutory aggravating factor (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(b)(7), and that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death, and his sentence was stayed (107 Ill. 2d R. 609(a)) pending appeal to this court (Ill. Const. 1970, art. VI, §4(b); 107 Ill. 2d R. 603). Codefendant Hernandez was also sentenced to death. On his separate appeal to this court, Hernandez' conviction was reversed for reasons similar to these which compel the reversal in this appeal of Cruz' conviction. See *People v. Hernandez* (1988), 121 Ill. 2d 293.

Evidence presented at trial indicated that on February 25, 1983, sometime between 1 p.m. and 3 p.m., some person or persons broke in the front door of the Nicarico home and later dragged Jeanine out of the house. Two days later, Jeanine's body was discovered in a wooded area on the Illinois Prairie Path near Eola Road, south of Illinois Route 5 in Naperville. The coroner determined that Jeanine's assailants had assaulted her anally and that several severe blows to the head caused her death. Examination of stomach contents showed that she died shortly after her abduction.

On March 14, 1983, detectives from the Du Page County sheriff's department questioned codefendant Hernandez, acting on an anonymous tip that he might have information concerning the murder. Hernandez then told police that he and codefendant Buckley heard a third individual named "Ricky" say he had killed the little girl. On April 17, 1983, sheriff's detectives spoke with Arthur Burell, an acquaintance of Cruz and Hernandez. Two days later they spoke with Cruz, who stated he knew Hernandez. On May 9, 1983, defendant requested a meeting with the detectives; on the way to

the sheriff's department offices, Cruz allegedly told them of a "vision" that he had had earlier that day, in which he saw that the victim had been dragged from her house and dumped near a field, and hit in the back of the head so hard that it left an impression in the mud where she lay. He also told detectives that she had been sexually violated anally. Detective Vosburgh of the Du Page County sheriff's department testified that he offered to show defendant a picture of the crime scene to determine if it coincided with his "vision," but defendant became emotionally upset and started to cry. On March 9, 1984, on the basis of these and other statements to various witnesses, defendant was arrested and charged with murder.

On appeal, the defendant's principal contention of error is that the circuit court failed to sever the trials of these codefendants. Cruz contends he was denied the right to confront witnesses against him guaranteed by the sixth amendment of the United States Constitution as interpreted by the Supreme Court in *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. *Bruton* stands for the proposition that confrontation is denied when out-of-court statements made by a nontestifying codefendant are used to inculpate another defendant. *Bruton* holds that prejudice from these explicit inculpations cannot be cured by instructions to the jury to consider the confession only against defendant A and disregard it against defendant B.

Cruz contends that statements made by Hernandez to various witnesses that he (Hernandez) had been involved in the crime with "friends" or "named individuals" directly implicated Cruz because the statements were inadequately redacted. (Redaction involves deleting, from out-of-court statements, references to defendants other than the declarant.) Cruz further argues that the witnesses' accounts of Hernandez' statements are contextu-

ally inculpating as well, where the prosecution presented evidence informing the jury that Hernandez and Cruz had been friends at the time of the crime. Defendant contends that the trial court was thoroughly apprised, prior to trial, of these statements by defendant and co-defendant Hernandez, as well as the prosecution's intent to establish a friendship link, and that the trial court's failure to grant the motions for severance denied him a fair trial so that the protections of *Bruton v. United States* were rendered illusory.

The People respond that severance was not required because codefendant Hernandez' statements implicating Cruz were redacted to eliminate all references to defendant and the prosecution did not seek to use the contents of Hernandez' statements as evidence against Cruz. The People maintain that there was no substantial risk here that the jury, despite instructions to consider statements only against the declarant, Hernandez, would look to the incriminating out-of-court statements of Hernandez to determine the guilt of Cruz. The People assert that the prosecution's argument to the jury that the codefendants were friends was proper because the friendship was relevant to show that the crime was committed by more than one person and that these defendants acted in concert in performing the crime. Relying upon *People v. Morgan* (1986), 112 Ill. 2d 111, the People state that any potential error was cured when the trial court sustained a defense objection to this line of argument.

The principal evidence presented at trial against Cruz consisted of testimony by witnesses to statements made by Cruz and codefendant Hernandez; while Hernandez' statements admit an involvement in the crime, defendant himself admits only that he had talked to persons who kidnapped the victim. However, the statement he made to police concerning a "vision" he had about the crime did demonstrate a knowledge of facts surrounding the

victim's death which the police had not disclosed to the public during the investigation, facts presumably known only to someone who had participated in the crime. Defense counsel attempted to persuade the jury that defendant's knowledge was gained in the course of cooperation with police investigators and that defendant's statements were fabricated in his attempt to collect a piece of the sizeable reward offered for the conviction of the killer.

Prior to trial, all defendants filed numerous motions for severance, providing the trial court with some 41 of the statements in which they implicated one another, statements which the People indicated they intended to use at trial. On August 29, 1984, counsel for Cruz argued that the statements by codefendant Hernandez would implicate Cruz at trial. The trial court noted the potential *Bruton* problem but denied the severance motions. On December 27, 1984, Cruz and codefendant Buckley renewed their motions for severance, as counsel for Buckley cited specific examples of statements made by codefendant Hernandez that would imply the complicity of codefendants Cruz and Buckley. The circuit court again denied the defendant's motions for severance, at which point defense counsel requested that the court rule on proposed redactions, and the court ordered that opposing counsel should confer to resolve the redaction problem. On January 3, 1985, defendants once again filed a motion for severance, accompanied by a list of the statements in which defendants implicated each other, but the circuit court denied that motion as well.

Cruz complains that testimony by several witnesses improperly linked him to Hernandez' admissions. Lieutenant Robert Winkler, an officer at the Du Page County corrections center, where Cruz and codefendant Hernandez were held, testified that early in June 1984, codefendant Hernandez requested to speak with him.

Hernandez told him that in February 1983, he had planned a burglary in Naperville "with two other named individuals." He said that they had proceeded to the location but when it came time to carry out the crime, he, Hernandez, lost his nerve and told the "two other named individuals" that he did not want to go through with the burglary, at which point they dropped him off three blocks away. He stated that they returned a short while later to pick him up and when he entered the vehicle, he noticed a little girl, as well as other items that were fruits of the crime. They returned to Aurora, at which point the "two named individuals" dropped him off at his home and that was the last he saw of the little girl. Prior to trial, Winkler had identified as the "two named individuals" Cruz and codefendant Buckley.

Winkler also testified to a conversation between himself and Cruz that had occurred a week to 10 days earlier. Cruz had related that some "friends" had approached him one day in February of 1983 and asked him if he wanted to be involved in a burglary, but that he declined to participate. He stated that he did not allow them to use his car, but did show them how to hotwire a vehicle. Cruz said the "named individuals" approached him two days later and asked him if he wanted to have sex with the little girl, but he once again declined to participate, at which point the individuals left.

Deputy Sheriff James Roberson stated prior to trial that codefendant Hernandez had told him that Cruz and codefendant Buckley had abducted the little girl and brought her to him. At trial, Roberson testified that codefendant Hernandez told him that he and "some friends" went to the Nicarico home to burglarize it, and that they had taken the young girl from the home, to try to get money for her. Roberson testified that Hernandez told him that when he left the place where he had taken the girl, the girl was still alive.

Armindo Marquez testified that he was a friend of codefendant Hernandez and that, while Marquez was incarcerated in the Kane County jail in March 1983, investigating officers arranged for him to meet with Hernandez, who told him that he had driven around the block and pulled into the driveway of the Naperville home, where he saw his "partner" pulling the little girl out of the house by her ankles. Marquez stated that Hernandez told him that the little girl was killed because she was making too much noise. Marquez' next testimony was that he had often seen Cruz and codefendant Hernandez together.

Jackie Estremara, codefendant Hernandez' cousin, testified that on October 8, 1983, Hernandez told him that "they" had gone to the house in Naperville intending to commit a burglary, and that they took the little girl with them when they left, because they did not want her to identify them to the police. Prior to trial, Estremara informed the police that Hernandez had told him that he and Cruz had killed the little girl after discovering her during the burglary.

Benigno Rodriquez testified that he was acquainted with Cruz and with codefendants Hernandez and Buckley. He further testified that he had seen defendant and codefendant Hernandez together two or three times a week for several years. Defense counsel objected to this testimony and moved for a mistrial, arguing that the testimony had absolutely no relevance to the case other than to link the codefendants' statements, but the motion was denied.

Claudino Montanez testified that he, too, was acquainted with both Cruz and codefendant Hernandez. He testified that he had seen all three defendants together several times a week during the summers of 1982 and 1983. Defense counsel registered an objection to this latter testimony, which objection was overruled.

In *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, the Supreme Court ruled that the admission in a joint trial of a statement by a nontestifying codefendant violated the defendant's constitutional right to confront witnesses against him, where that statement expressly named the defendant as an accomplice in the crime charged. The *Bruton* Court reasoned that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (391 U.S. at 135, 20 L. Ed. 2d at 485, 88 S. Ct. at 1627) and that the admission of a statement "expressly implicating" the defendant constituted such a context (391 U.S. at 124 n.1, 20 L. Ed. 2d at 478 n.1, 88 S. Ct. at 1621 n.1). Recently, in *Richardson v. Marsh* (1987), 481 U.S. ____, 95 L. Ed. 2d 176, 107 S. Ct. 1702, the Supreme Court addressed a type of *Bruton* problem involving contextual inculpation. In that case, the codefendant Williams' written confession had been redacted. Not only had the defendant Marsh's name been deleted, but also throughout the confession, any reference to her existence had been expunged. (481 U.S. at ____, 95 L. Ed. 2d at 183, 107 S. Ct. at 1705.) However, in the context of later testimony given by the defendant herself, and in the context of the prosecutor's closing argument, the confession in fact became incriminating to Marsh. There were numerous instructions by the trial judge to the jury that the confession was not to be considered against defendant Marsh.

Under these circumstances, the Supreme Court declined to extend the *Bruton* analysis to contextually inculpating statements. The Court noted that in situations like *Bruton* where the codefendant is explicitly named, there is an overwhelming probability that a jury would not be able to follow a limiting instruction. (*Richardson*,

481 U.S. at ___, 95 L. Ed. 2d at 186, 107 S. Ct. at 1707-08.) When, the Court stated, the jury has to link by inference the declarant's confession and other evidence to incriminate the defendant, it is far less likely that the jury will disregard the limiting instruction. (481 U.S. at ___, 95 L. Ed. 2d at 186, 107 S. Ct. at 1708.) In *Richardson*, the Court, referring to footnote 10 in *Bruton*, notes that redaction is one way to cure an explicitly incriminating confession. (481 U.S. at ___, 95 L. Ed. 2d at 186, 107 S. Ct. at 1708.) The Court, in *Richardson*, holds that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when *** the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." (481 U.S. at ___, 95 L. Ed. 2d at 188, 107 S. Ct. at 1709.) We think it is noteworthy that *Bruton* footnote 10, to which the Court refers in *Richardson* (concerning redaction as a method by which the prosecution can still have the benefit of the confession), clearly disfavors attempts at redaction in oral testimony. *Bruton v. United States* (1968), 391 U.S. 123, 134 n.10, 20 L. Ed. 2d 476, 484 n.10, 88 S. Ct. 1620, 1626 n.10.

In this case we are not dealing with a carefully redacted written confession, we are dealing with out-of-court admissions made by defendants to third parties which inculpated other defendants. To date then, the Supreme Court has examined admission of a codefendant's confession which *explicitly* names the defendant (*Bruton*) and admission of one which contains *no reference* at all to a defendant (*Richardson*). We are currently presented with a situation falling someplace between those two end points of the spectrum and, parenthetically, in an area about which the *Richardson* opinion specifically expressed no opinion. *Richardson*, 481 U.S. at ___ n.5, 95 L. Ed. 2d at 192 n.5, 107 S. Ct. at 1709 n.5.

The *Bruton* decision, as well as decisions of this court, recognizes that there are circumstances under which the presumption that a jury can and will follow a trial court's instruction to disregard an incriminating inference generated by a confession or admission introduced against a codefendant must fall. (*Bruton v. United States* (1968), 391 U.S. 123, 135-36, 20 L. Ed. 2d 476, 485, 88 S. Ct. 1620, 1627-28; *People v. Johnson* (1958), 13 Ill. 2d 619; *People v. Hodson* (1950), 406 Ill. 328; *People v. Buckminster* (1916), 274 Ill. 435.) In *Bruton*, as we have noted, this meant the presentation to the jury of a statement by a codefendant directly naming the defendant as an accomplice. In *Johnson*, the codefendant's confession was presented to the jury with the word "blank" substituted for the defendant's name (*People v. Johnson* (1958), 13 Ill. 2d 619, 623), and in *Hodson*, the codefendant's references to defendant as his accomplice were redacted by substituting a letter of the alphabet for the defendant's name (*People v. Hodson* (1950), 406 Ill. 328, 333-34). In each of these cases, it was held that a violation of defendant's right of confrontation occurred. It was reasoned that human experience informs us that the jury is aware of the name of the person to whom the codefendant refers and cannot be expected not to use that piece of evidence against the person who was so clearly identified in the statement.

Defendant argues that Hernandez' statements are both directly and contextually incriminating. In our opinion, although Hernandez' admissions are not directly inculpatory of defendant, in that they did not explicitly state to the jury that Rolando Cruz was his accomplice, the nature of these redactions in the context of the joint trial and the testimony linking Cruz with Hernandez rendered it impossible for the jury to conclude that the persons to whom Hernandez referred were anyone other than the two men seated next to him in the courtroom.

In *Richardson*, the Supreme Court rejected the theory of contextual inculpation because the confession by codefendant made no reference at all to the defendant and became incriminating only when coupled with the defendant's own testimony. In the case before us, the physical setting of the trial as well as the prosecution's introduction of acquaintanceship evidence formed an impermissibly incriminating context when they established the terms "friends" and "two named individuals" as thinly veiled references to Hernandez' codefendants. No "substantial inference" was required of the jury to identify defendant as one of the "friends" mentioned by witnesses to Hernandez' statements. (See *United States ex rel. Nelson v. Follette* (2d Cir. 1970), 430 F.2d 1055, 1059.) As a result, it would be unrealistic in the extreme to expect a jury to ignore the clear import of Hernandez' statements, despite their redaction.

Furthermore, any possibility that the jury would be able to follow the court's limiting instructions was removed when the prosecution encouraged the jurors to consider each codefendant's admission against the other defendants, implying that the defendants' friendship allowed them to do so. In his closing arguments, the prosecutor directly addressed the connections between the defendants' statements:

> "MR. KNIGHT [Assistant State's Attorney]: *** If Buckley kicked the door in, all right. *What does that tell you about those admissions they've made? Not only are they friends—*
>
> MR. JOHNSON [Counsel for defendant Buckley]: Objection, your Honor. I object to that as contrary to the law.
>
> MR. LAZ [Counsel for defendant Cruz]: I join in that, Judge.
>
> MR. JOHNSON: The last three statements.
>
> THE COURT: So far, it's proper argument. May continue.

MR. KNIGHT: You've seen that they're friends. They live in the same neighborhood. They're all in the same proximity with respect to the victim's home. And I'm using it only in the direction of Cruz and Hernandez because the fact is they've made statements which are directed as admissions against them.

Okay. But they're also friends of Buckley's.

MR. JOHNSON: Objection, Judge. That inference is improper.

THE COURT: Confine—

MR. KNIGHT: This is only—

THE COURT: Confine it to the evidence now and relate it in that fashion.

MR. KNIGHT: This is only as to Cruz and Hernandez I'm talking about. Okay. *They're friends. They're neighbors. Therefore, when they make admissions that they've committed this crime, it's much more—*

MR. JOHNSON: Objection.

THE COURT: Objection sustained." (Emphasis added.)

Indeed, the Supreme Court in *Richardson* recognized the error which occurs when a prosecutor attempts to undo the effect of the limiting instruction by urging the jury to use a codefendant's statements in evaluating a defendant's case. (*Richardson v. Marsh* (1987), 481 U.S. ____, ____, 95 L. Ed. 2d 176, 188, 107 S. Ct. 1702, 1709.) In light of the prosecution's evidence relating solely to the friendship of the codefendants, in the testimony of Claudino Montanez and Benigno Rodriquez, as well as its attempts during closing argument to lead the jury to connect defendant with Hernandez' statements, we find a deliberate and constitutionally unacceptable attempt by the prosecution to circumvent the strictures of *Bruton* and the confrontation clause. See *People v. Clark* (1959), 17 Ill. 2d 486, 491.

Finally, buttressing our conclusion that defendant was denied a fair trial is the fact that the jury was informed by the prosecution, in the course of the examination of

the People's witnesses, that the statements of Hernandez testified to by that witness had been redacted. During the direct examination of witness Jackie Estremara, the prosecutor remarked, "I am going to ask you a series of questions about that conversation, but as I ask you those questions *** do not mention the name of any other person to whom he [Hernandez] referred." The People argue that this statement, far from prejudicing defendant, assisted his cause by precluding an inadvertent identification of defendant by the witness. Informing jurors that statements have been redacted can itself be grounds for a mistrial (*United States v. Danzey* (2d Cir. 1979), 594 F.2d 905, 918) and, in this case, put the jurors on notice that the testimony was being edited to protect someone involved in the trial, encouraging them to speculate as to the missing names.

Defendant argues that a severance should have been granted and that the denial of severance by the trial court was an abuse of the court's discretion. As noted in *Richardson*, anticipating the possibility of contextual inculpation presents practical problems for a trial court, when the court would be required to examine the evidence in advance to determine whether or not particular pieces of evidence, harmless individually, could be linked by the prosecution to effectively use one defendant's statement against another. (*Richardson v. Marsh* (1987), 481 U.S. ____, ____, 95 L. Ed. 2d 176, 187, 107 S. Ct. 1702, 1708.) In the case at bar, however, the prosecution's course was sufficiently clear in advance of trial, during argument on the defendants' motion to sever, as the People had indicated their intention to introduce statements detailing a friendship among the defendants. Given the People's heavy reliance upon the inculpatory statements of the codefendants, the likelihood of prejudice was predictable enough to require a severance. (See *People v. Daugherty* (1984), 102 Ill. 2d 533, 541.) While

the circuit court ordered the parties to cooperate in redacting the defendants' statements, it apparently never ruled on a final edit. The record reveals that it became increasingly clear in the course of the trial that the redactions were insufficient to safeguard defendant's rights. When the prosecution introduced the acquaintanceship testimony by Rodriquez and Montanez, following the testimony on Hernandez' admission, the prosecution's announced course was completed and the predicted prejudice realized.

We cannot conclude that the error in admission of the poorly redacted statements was harmless, as it would be impossible for this court to decide whether the prosecution's comments did or did not affect the verdict. (*Bruton v. United States* (1968), 391 U.S. 123, 136, 20 L. Ed. 2d 476, 485, 88 S. Ct. 1620, 1628; *People v. Knippenberg* (1977), 66 Ill. 2d 276, 287.) As noted earlier, none of defendant's statements admitted an involvement in the crime, although they did indicate knowledge of unpublished details about the crime, while Hernandez' statements consisted of clear admissions of participation in the burglary and presence at the time of the murder. The evidence against defendant was not overwhelming, and determining the outcome in the absence of the improper testimony is impossible. Therefore, since we cannot say beyond a reasonable doubt that the error did not affect the verdict (*People v. Wilkerson* (1981), 87 Ill. 2d 151, 157), reversal and remand for a new trial is the proper remedy.

Despite this conclusion, we do not agree with defendant's contention that the evidence presented was insufficient to prove him guilty beyond a reasonable doubt, thus precluding his retrial. (See *People v. Taylor* (1979), 76 Ill. 2d 289, 309.) Defendant argues that there must be some physical evidence in addition to his own admissions upon which to base a conviction. However, all that the

law requires is evidence, apart from the admission, that a crime occurred, and the fact of the murder is sufficient evidence in this case. (*People v. Willingham* (1982), 89 Ill. 2d 352, 358-59.) Defendant states that the admissions made by him in this case are so incredible that no proper inference of guilt may be drawn from them; we do not find them so incredible that we can say, as a matter of law, that they cast a reasonable doubt on defendant's guilt. Danny Fowler testified that defendant had told him he was present when the girl was killed. Ramon Mares testified that defendant had told him a similar story. Steven Ford testified that defendant told him that defendant had lived in woods near the Naperville-Aurora border, but something had happened which forced him to move out of there. While the testimony of these witnesses was suspect to some degree, any determination of their credibility must be left to the jury. (*People v. Locascio* (1985), 106 Ill. 2d 529, 537.) Finally, Detectives Vosburgh and Kurzawa testified to defendant's "vision" statement of May 9, 1983; while there may be other explanations for defendant's knowledge of details of the crime, their credibility is, once again, a matter for the jury. Defendant did not present an argument which convinces us that he learned the details of the crime contained in his "vision" from law enforcement officers, unlike the defendant in *People v. Linscott* (1985), 135 Ill. App. 3d 773. Nor is defendant's alibi so solid that it casts a reasonable doubt on the prosecution's case. (*People v. Thomas* (1955), 7 Ill. 2d 278, 282.) In sum, the evidence was neither so strong as to make the State's *Bruton* violations harmless error, nor so weak as to necessarily leave a reasonable doubt of defendant's guilt. *People v. Hernandez* (1988), 121 Ill. 2d 293; *People v. Collins* (1985), 106 Ill. 2d 237, 261.

Because statements by a codefendant presented by the prosecution improperly referred to defendant, and

the prosecution subsequently urged the jury to consider those statements against defendant, a violation of defendant's constitutional rights occurred; since the error cannot be considered harmless, the defendant's convictions must be reversed and his sentence vacated. The case is remanded to the circuit court of Du Page County for further proceedings.

Reversed and remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

APPENDIX B

SUPREME COURT OF ILLINOIS

Springfield, Illinois, April 5, 1988

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

* * * * *

No. 61678—People State of Illinois, appellee, v. Rolando Cruz, appellant. Appeal, Circuit Court (DuPage). Petitions for rehearing denied.

* * * * *

EDITOR'S NOTE

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ORIGINAL

NO. 87-2004

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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SUPREME COURT, U.S.

PEOPLE OF THE STATE OF ILLINOIS, Petitioner

vs.

ROLANDO CRUZ, Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The respondent, Rolando Cruz, generally accepts the petitioner's Statement of the Case. On seven occasions in its Statement, however, the petitioner erroneously described certain testimony adduced at trial as having been admitted against Respondent Cruz. That testimony was actually admitted against codefendant Hernandez.

In the Petition for Writ of Certiorari at 8, fourth paragraph, the term "Respondent" should be replaced with the name "Hernandez." At the top of 9, third sentence, "Respondent" should be replaced with "Hernandez." On that same page, second paragraph, the term "Respondent" twice should be replaced with "Hernandez." In the Petition at 11, second paragraph, the term "Respondent" should twice be replaced with the name "Hernandez." Finally, in the Petition at 12, fourth paragraph, the term "Respondent" should be replaced with the name "Hernandez."

I.

REASONS FOR DENYING THE WRIT

BECAUSE THE STATE FAILED TO REDACT THE MULTIPLE STATEMENTS OF MR. CRUZ'S NONTESTIFYING CODEFENDANT BY THE USE OF NEUTRAL TERMS, BECAUSE THE STATE ADDUCED TESTIMONY WHOSE ONLY PURPOSE WAS TO IDENTIFY MR. CRUZ'S NAME AS ONE OF THE NAMES REPLACED IN THE REDACTED STATEMENTS, AND BECAUSE THE STATE UNDID THE EFFECT OF THE LIMITING INSTRUCTIONS BY ARGUING TO THE JURY THAT IT COULD CONSIDER THE STATEMENTS OF MR. CRUZ'S CODEFENDANT AGAINST MR. CRUZ, THE ILLINOIS SUPREME COURT PROPERLY HELD THAT MR. CRUZ'S FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED. IN ADDITION, ADEQUATE AND INDEPENDENT STATE GROUNDS, TO WIT, THE VIOLATION OF STATE SEVERANCE LAW, EXIST FOR THE SAME JUDGMENT TO OBTAIN EVEN UPON THE GRANTING OF CERTIORARI AND REVERSAL BY THIS COURT ON THE FEDERAL CONSTITUTIONAL ISSUE.

It is clear from the opinion of the Illinois Supreme Court in People v. Cruz, 121 Ill.2d 321, 521 N.E.2d 18 (1988), that the court fully comprehended this court's holdings in Bruton v. United States, 391 U.S. 123 (1968), and Richardson v. Marsh, 481 U.S. ___, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), before it endeavored to apply the principles derived from Bruton and Richardson to the case at bar. The Cruz court duly noted that the federal constitutional issue with which it was presented fell somewhere between the "admission of a codefendant's confession which explicitly names the defendant (Bruton) and the admission of one which contains no reference at all to a defendant (Richardson)." 121 Ill.2d at 330, 521 N.E.2d at 22 (emphasis original).

A unanimous Illinois Supreme Court held that the confrontation clause is violated where the multiple statements of a nontestifying codefendant are admitted at the joint trial of three persons after the statements have been redacted to remove the names of the codefendants but, rather than replacing the codefendants' names with neutral pronouns, the non-neutral terms "friends" and "two named individuals" are employed, where the context of the joint trial and acquaintanceship testimony serve to reveal the identity of names replaced in the redacted statements, and where the prosecutor's closing argument instructs the jury, contrary to the limiting instructions, that because the codefendants are friends the jury may consider each one's

admissions against the others. People v. Cruz, 121 Ill.2d at 331, 521 N.E.2d at 23.

The Illinois Supreme Court cited Bruton and its own earlier precedents for the proposition that "there are circumstances under which the presumption that a jury can and will follow a trial court's instruction to disregard an incriminating inference generated by a confession or admission introduced against a codefendant must fall." 121 Ill.2d at 331, 521 N.E.2d at 22. The court found that, "although Hernandez's admissions are not directly inculpatory of defendant, in that they did not explicitly state to the jury that Rolando Cruz was his accomplice, the nature of these redactions in the context of the joint trial and the testimony linking Cruz with Hernandez rendered it impossible for the jury to conclude that the persons to whom Hernandez referred were anyone other than the two men seated next to him in the courtroom." 121 Ill.2d at 331, 521 N.E.2d at 23.

The Illinois Supreme Court noted that in Richardson this Court "rejected the theory of contextual inculpation because the confession by codefendant made no reference at all to the defendant and became incriminating only when coupled with the defendant's own testimony." See, Richardson v. Marsh, 481 U.S. at ___, 107 S.Ct. at 1709, 95 L.Ed.2d at 188 ("[T]he Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence.") Respondent concurs that where the nontestifying codefendant's statement has been redacted to remove all reference to the defendant and the statement is admitted at the joint trial, the defendant is not denied his right to confront the witnesses against him.

As the Illinois Supreme Court noted, however, this was not such a case. In fact, the federal constitutional question addressed in Cruz was even quite different from the question explicitly left open by this Court in Richardson: whether a confession would be admissible "in which the defendant's name has been replaced with a symbol or neutral pronoun." 481 U.S. at ___

n. 5, 107 S.Ct. at 1709 n. 5, 95 L.Ed.2d at 192 n. 5. Not only were all references to the codefendants not removed from the admitted statements, but the substituted terms in no way can be described as "neutral." The Illinois Supreme Court relied on the inadequacy of the redactions, the context of the joint trial and the effect of the prosecutor's closing argument which undid the limiting instructions in distinguishing this case from Richardson:

> In the case before us, the physical setting of the trial as well as the prosecution's introduction of acquaintanceship evidence formed an impermissibly incriminating context when they established the terms "friends" and "two named individuals" as thinly veiled references to Hernandez' codefendants. No "substantial inference" was required of the jury to identify defendant as one of the "friends" mentioned by witnesses to Hernandez' statements. (See United States ex rel. Nelson v. Follette (2d Cir. 1970), 430 F.2d 1055, 1059.) As a result, it would be unrealistic in the extreme to expect a jury to ignore the clear import of Hernandez' statements, despite their redaction.
>
> Furthermore, any possibility that the jury would be able to follow the court's limiting instructions was removed when the prosecution encouraged the jurors to consider each codefendant's admission against the other defendants, implying that the defendants' friendship allowed them to do so.
>
> People v. Cruz, 121 Ill.2d at 331, 521 N.E.2d at 23.

Rather than aligning the Illinois Supreme Court on the "wrong side of what petitioner respectfully suggests is a post-Richardson split among the Circuit Courts of Appeals regarding the substitution of neutral terms as a means of redacting statements of non-testifying codefendants," the court's decision is easily reconciled with the cases cited by the State. (Petition for Writ of Certiorari at 23) Where the term "friends" is substituted, and context and other identifying evidence clearly reveal the codefendants to be those whose names have been removed, it cannot be said that the redaction was accomplished with a "neutral" term. That is precisely what the court held in United States v. Petit, 841 F.2d 1546 (11th Cir. 1988); see also, Alexander v. State, 562 S.W.2d 207 (1977) (Tenn.Crim.App.), and People v. Bell, 302 N.Y.S.2d 946, 32 A.D.2d 781 (1969), both of

which were cited by the Illinois Supreme Court in its decision in which it reversed the convictions and death sentence of Mr. Cruz's codefendant on similar grounds. People v. Hernandez, 121 Ill.2d 293, 521 N.E.2d 25, 35 (1988).

The State contends that a "post-Richardson split" exists because Petit and United States v. Diaz, 836 F.2d 385 (8th Cir. 1987), reached contrary conclusions with respect to the question of whether the defendant was contextually inculpated. In Diaz, however, the codefendant's statement was redacted so that the neutral term "someone" was substituted for the defendant's name. The Diaz court held that because there was no direct reference to the defendant, Bruton was not violated. The court then acknowledged that this Court left open in Richardson the admissibility of a confession in which the defendant's name has been replaced with a neutral pronoun. The court concluded: "Finally, even if the reference to Diaz's role were to take this case out of the rule in Marsh, introduction of the statement was beyond a reasonable doubt only harmless error." United States v. Diaz, 836 F.2d at 391 (citations omitted).

Mr. Cruz concurs that the removal of the defendant's name and its replacement with a term as innocuous as "someone" in a single statement of a codefendant would not be violative of the confrontation clause. Very distinct facts compelled the Eighth and Eleventh Circuits to arrive at different conclusions on the question of whether a criminal defendant was contextually inculpated.

Significantly, the Diaz court further indicated that under its own and other federal precedents, it would be error if the redacted statement alerted the jury to the fact that a name available to the prosecution had been purposely omitted. Id. at 390-391. See, United States v. Brierly, 501 F.2d 1024 (8th Cir. 1974), cert. denied, 419 U.S. 1052 (1974); Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), cert. denied, 470 U.S. 1055 (1985).

In his original brief, Mr. Cruz urged as an additional ground for the reversal of his convictions that the jury was explicitly apprised that the statements of his codefendant had

been redacted to remove the identities of persons who originally were named in the statements. Mr. Cruz claimed that he was denied his right to confront the witnesses against him in violation of United States v. Danzey, 594 F.2d 905, 917-919 (2d Cir. 1979), cert denied, 441 U.S. 951 (1979).

Not only did Officer Winkler testify that Hernandez told him that he and "two named individuals" performed certain illegal acts, but the prosecutor also prefaced his questions to witness Estremera by instructing the witness, "[D]o not mention the name of any other person to whom [Hernandez] referred." The Illinois Supreme Court cited Danzey and indicated that its conclusion that Mr. Cruz was denied a fair trial was buttressed by the jurors' being put "on notice that testimony was being edited to protect someone involved in the trial, encouraging them to speculate as to the missing names." People v. Cruz, 121 Ill.2d at 333-334, 521 N.E.2d at 24.

The State further argues that had the jury been unable to follow its instructions, "it would have convicted codefendant Buckley as well as defendant." (Petition for Writ of Certiorari at 27) Because it did not do so, the State concludes, "it is unreasonable to conclude that the jury was unable to follow the instructions given concerning statements made by Cruz and Hernandez." Id.

The State's reasoning is specious. Codefendant Buckley was not acquitted of the offenses charged. It cannot be said, therefore, that he was not prejudiced by the admission of his codefendants' statements at the joint trial. After codefendants Cruz and Hernandez were sentenced to death and prior to Buckley's scheduled retrial, the State moved successfully to dismiss the charges against Buckley, who the State consistently maintained was the principal for whose acts Mr. Cruz was merely accountable. The fact of dismissal virtually compels the conclusion that the jury's inability to reach a verdict as to Buckley, rather than outright acquitting him, resulted from the admission of codefendants' statements.

Finally, this Court should deny the writ because, contrary to the State's assertion in that portion of its petition labeled "Jurisdiction," the decision of the Illinois Supreme Court also rested on adequate and independent state grounds.[1]

In Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983), this Court stated that "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. ... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." This Court further indicated that it views its inability to render advisory opinions as a limitation on its jurisdiction: "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." 463 U.S. at 1041, quoting from Herb v. Pitcairn, 324 U.S. 117, 124 (1945) (footnote omitted).

In his brief on appeal, Mr. Cruz argued first to the Supreme Court of Illinois that his convictions should be reversed on the ground that they were obtained in violation of state severance law. Mr. Cruz next argued that his convictions were infirm because the terms substituted for his name in the redacted

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1 In fact, the Illinois Supreme Court cited Richardson for the proposition that Mr. Cruz's confrontation right was violated where the State adduced the testimony of certain witnesses solely for the purpose of demonstrating friendship among the codefendants and where it attempted "during closing argument to lead the jury to connect defendant with Hernandez' statement." 121 Ill.2d at 333, 521 N.E.2d at 24. In Richardson, this Court ruled that it is error for the prosecutor to undo the effect of the limiting instruction by urging the jury to use the codefendant's statement against the defendant in evaluating the defendant's case. 481 U.S. at ___, 107 S.Ct. at 1709, 95 L.Ed.2d at 188. While the prosecutor's misuse of codefendant Hernandez's statements at closing argument constituted a separate federal constitutional ground upon which the Illinois Supreme Court's decision rested, the State has not sought certiorari on that issue and has, instead, dismissed it in a footnote as having been misapprehended by the Illinois Supreme Court. See, Petition for Writ of Certiorari at 24 n. 1.

statements of codefendant Hernandez were inadequate as a matter of state and federal law, and that those redactions, when viewed in the context of the joint trial and in light of friendship testimony and the prosecutor's closing argument, contextually inculpated him. Lastly, Mr. Cruz argued that his confrontation right was abridged where the State explicitly indicated to the jury that names had been removed from codefendant Hernandez's statements, leaving the jury free to speculate that Mr. Cruz was named in those statements.

Even in the absence of federal constitutional grounds for reversing Mr. Cruz's convictions, the Illinois Supreme Court would have reversed the convictions on its determination that Mr. Cruz and his codefendants should have been tried separately as a matter of state law. The Cruz court based the state law portion of its decision on People v. Daugherty, 102 Ill.2d 533, 541, 468 N.E.2d 969, 973 (1984), in which the court earlier had stated that severance should be granted where the defendant has predicted with specificity in advance of trial how he will be prejudiced by proceeding with a joint trial. "In ruling on the motion for severance the trial judge must make a prediction about the likelihood of prejudice at trial, taking into account the papers presented, the arguments of counsel, and any other knowledge of the case developed from the proceedings." 102 Ill.2d at 541, 468 N.E.2d at 972-973.

The prejudice to which Daugherty refers may derive from statements of a codefendant which implicate the defendant. They may implicate him directly or contextually. 102 Ill.2d at 521-542, 468 N.E.2d at 972-973, citing Bruton and People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959). See, People v. Johnson, 13 Ill.2d 619, 150 N.E.2d 597 (1950) (severance should have been granted where redactions in which defendant's name was removed from codefendant's statements and replaced with the term "blank," and additional "identifying material" advised the jury that the unnamed person was the defendant); People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950) (defendant contextually inculpated where his name was removed from the codefendant's statement and

the letter "A" was substituted). Johnson and Hodson were cited approvingly in Clark, 17 Ill.2d at 490-491, 162 N.E.2d at 416, and Cruz, 121 Ill.2d at 331, 521 N.E.2d at 22.

The Illinois Supreme Court analyzed the state severance issue thusly:

> [T]he prosecution's course was sufficiently clear in advance of trial, during argument on the defendant's motion to sever, as the People had indicated their intention to introduce statements detailing a friendship among the defendants. Given the People's heavy reliance upon the inculpatory statements of the codefendants, the likelihood of prejudice was predictable enough to require a severance. (See People v. Daugherty (1984), 102 Ill.2d 533, 541, 82 Ill.Dec. 315, 468 N.E.2d 969.) While the circuit court ordered the parties to cooperate in redacting the defendant's statements, it apparently never ruled on a final edit. The record reveals that it became increasingly clear in the course of the trial that the redactions were insufficient to safeguard defendant's rights. When the prosecution introduced the acquaintanceship testimony of Rodriquez and Montanez, following the testimony on Hernandez' admission, the prosecution's announced course was completed and the predicted prejudice realized.
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> Cruz, 121 Ill.2d at 334-335, 521 N.E.2d at 24.

Hence, it is clear that the Illinois Supreme Court would have reversed Mr. Cruz's convictions even in the absence of the federal constitutional violations described in the court's opinion. Therefore, even if this Court were to grant certiorari and find that the Illinois Supreme Court had misapplied federal law, the same judgment would be rendered in state court: Mr. Cruz's convictions would be reversed and the cause remanded for a new trial. Therefore, this court's opinion on the federal constitutional question would simply be advisory. Michigan v. Long, 463 U.S. at 1041.

CONCLUSION

For the foregoing reasons, respondent Rolando Cruz respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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